

**United States Department of Labor
Employees' Compensation Appeals Board**

R.J., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
NORTH TEXAS HEALTH CARE SYSTEM,
Dallas, TX, Employer**

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**Docket No. 15-1797
Issued: April 7, 2016**

Appearances:

*Michael E. Woods, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 31, 2015 appellant, through his representative, filed a timely appeal of an August 19, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 30, 2014, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant's representative contends that the impartial medical adviser was improperly selected because his primary location was outside appellant's zip code cluster and beyond the 200 mile maximum radius allowed. He also asserts that the only documents

¹ 5 U.S.C. § 8101 *et seq.*

establishing the use of the medical management system is a Form ME023 on such evidence is insufficient.

FACTUAL HISTORY

On May 24, 2005 appellant, then a 24-year-old medical support assistant, filed an occupational disease claim (Form CA-2) alleging that he developed right cervical disc bulge and right arm pain due to his employment duties. His attending physician, Dr. Douglas S. Won, a Board-certified orthopedic surgeon, found that appellant was totally disabled through May 12, 2005. On July 7, 2005 OWCP accepted his claim for right carpal tunnel syndrome.

Appellant's attending physician, Dr. Ronald J. Washington, an internist, completed a series of reports diagnosing right carpal tunnel syndrome beginning on September 12, 2005. He noted that appellant was disabled on June 1, 2005 as he was unable to perform his light-duty position as it worsened his symptoms. By decision dated October 17, 2006 OWCP authorized compensation benefits beginning June 1, 2005.

OWCP referred appellant for a second opinion evaluation with Dr. Robert M. Chouteau, a Board-certified orthopedic surgeon on June 29, 2007. In a report dated July 17, 2007, Dr. Chouteau noted that his examination of appellant was normal and that appellant showed no evidence of disability based on the accepted diagnosis of right carpal tunnel. He opined that appellant could return to full duty with no restrictions.

Dr. Washington disagreed with Dr. Chouteau's conclusions on August 16, 2007 and noted that appellant's electrodiagnostic studies supported his ongoing carpal tunnel syndrome condition.

Due to the conflict of medical opinion evidence, OWCP referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon on September 6, 2007. In his October 3, 2007 report, Dr. Hood found positive median compression test, positive Phalen's test, and decreased two-point discrimination. He found that appellant could return to light-duty work, but recommended carpal tunnel release and decompression of the right shoulder.

Appellant underwent a right carpal tunnel surgical release on November 16, 2007. Following this surgery, Dr. Washington provided work restrictions. Beginning on January 15, 2009 Dr. Washington removed the work restrictions.

On August 3, 2009 OWCP referred appellant for a second opinion evaluation with Dr. Arthur Sarris, a Board-certified orthopedic surgeon, to determine the nature and extent of appellant's disability. In a report dated August 27, 2009, Dr. Sarris opined that appellant continued to experience residuals and disability due to his accepted right carpal tunnel syndrome. He found that appellant was totally disabled.

Dr. Washington continued to diagnose right carpal tunnel syndrome and indicate that appellant was totally disabled throughout 2009, 2010, and 2011. Appellant's surgeon, Dr. Olayinka Ogunro, a Board-certified orthopedic surgeon, also supported appellant's continued carpal tunnel syndrome and disability for work on June 30, 2011.

On September 28, 2011 OWCP referred appellant for a second opinion report with Dr. Marvin E. Van Hal, a Board-certified orthopedic surgeon, to determine the nature and extent of appellant's disability. In a report dated December 13, 2011, Dr. Van Hal found that the Phalen's test and Tinel's sign were negative. He noted that appellant's two-point discrimination was normal. Dr. Van Hal opined that appellant was not disabled due to his accepted condition of carpal tunnel syndrome. He found no objective evidence of residuals.

Dr. Washington reviewed Dr. Van Hal's report on February 9 and March 8, 2012 and disagreed with his findings and conclusions.

To resolve the conflict in medical opinion, OWCP selected Dr. Charles Kennedy, a Board-certified orthopedic surgeon, to serve as the impartial medical examiner through an ME023 dated December 3, 2012. There was also a screen capture of his selection. On December 5, 2012 OWCP referred appellant for an impartial medical examination with Dr. Kennedy.

In a report dated December 28, 2012, Dr. Kennedy found that appellant was not disabled and no longer exhibited right carpal tunnel syndrome. He opined that appellant could return to his regular-duty position.

By letter dated March 14, 2013, OWCP proposed to terminate appellant's wage-loss compensation based on Dr. Kennedy's report. It afforded appellant 30 days to respond.

By decision dated April 24, 2013, OWCP terminated appellant's wage-loss benefits effective April 7, 2013 based on Dr. Kennedy's report.

Dr. Washington continued to support appellant's diagnosis of right carpal tunnel syndrome and his disability for work.

On July 30, 2014 OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity.

Dr. Washington continued to support appellant's diagnosis of right carpal tunnel syndrome and his disability for work throughout 2014. Appellant sought treatment from Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon beginning February 19, 2015. He noted that appellant underwent right shoulder surgery on January 19, 2015. Dr. Shade diagnosed impingement syndrome right shoulder surgically treated, cervical radiculopathy C5-6, bilateral carpal tunnel syndrome, and bilateral cubital tunnel syndrome.

OWCP issued a decision dated May 7, 2015 accepting the additional conditions of brachial neuritis or radiculitis, and a right shoulder condition. Appellant completed a claim for compensation (Form CA-7) requesting wage-loss compensation from April 7, 2013 through May 14, 2015. In a letter dated May 19, 2015, OWCP informed appellant that the additional conditions were accepted in error and requested that appellant submit a new claim.

Dr. Shade completed an attending physician's report (Form CA-20) on May 13, 2015 and opined that appellant was totally disabled. He diagnosed right carpal tunnel syndrome, brachial neuritis or radiculitis, and condition of the right shoulder. Dr. Shade indicated with a checkmark

“yes” that appellant’s conditions were due to his employment. In a separate narrative report, he attributed appellant’s diagnosed conditions to his employment duties of eight hours of computer repetitive keying, telephone usage, repetitive motions, inserting data in the computer, simple grasping, and prolonged sitting. Dr. Shade continued to diagnose carpal tunnel syndrome, brachial neuritis, and right shoulder condition.

In a letter dated June 15, 2015, appellant’s representative requested a copy of documents showing the bypass and selection process for referee physician Dr. Kennedy. In a letter dated June 16, 2015, OWCP provided the requested information.

On June 29, 2015 appellant’s representative requested reconsideration of the April 24, 2013 termination decision. He argued that Dr. Kennedy was improperly selected as the impartial medical adviser. In support of this request, the representative submitted Dr. Kennedy’s physician profile from the Texas medical board. He also alleged that appellant was allowed less than 30 days to respond to the pretermination notice.

Appellant continued to submit reports from Dr. Shade dated June 18 through July 24, 2015. Dr. Shade listed appellant’s diagnosed conditions of right carpal tunnel syndrome, brachial neuritis, and right shoulder impingement. He did not address appellant’s disability for work.

By decision dated August 19, 2015, OWCP declined to reopen appellant’s claim on the merits. It noted that he disagreed with the selection of Dr. Kennedy. OWCP asserted that the Medical Management Application system was appropriately utilized in selecting Dr. Kennedy. It further noted that appellant contended that the effective date of termination was prior to the issuance of the termination decision, that OWCP granted appellant compensation benefits through May 4, 2014, and that therefore appellant’s compensation benefits should not have terminated until May 5, 2013. OWCP declined to reopen appellant’s claim for consideration of the merits.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.²

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.³

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.⁴ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.⁵

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been present, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁷

ANALYSIS

The most recent adverse decision reviewing the merits of appellant's case was OWCP's April 24, 2013 decision. The appeal rights attached to that decision explained that appellant had one calendar year from the date of that decision, or until April 24, 2014, to submit to OWCP a reconsideration request.

OWCP received appellant's request for reconsideration on June 29, 2015. As the received date was more than one year after April 24, 2013, appellant's request must be considered untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

In denying appellant's reconsideration request, OWCP did not determine whether appellant's reconsideration request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the inappropriate standard of review to the untimely request for reconsideration, the Board will set aside OWCP's August 19, 2015 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.⁸

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (October 2011).

⁵ *Id.*

⁶ 20 C.F.R. § 10.607.

⁷ *Supra* note 4 at Chapter 2.1602.5.a (October 2011).

⁸ See 20 C.F.R. § 10.607(b). See *W.L.*, Docket No. 15-1842 (issued January 14, 2016); *L.D.*, Docket No. 15-0865 (issued October 6, 2015).

CONCLUSION

The Board finds that OWCP improperly denied appellant's June 29, 2015 reconsideration request under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further review under the clear evidence of error standard.

Issued: April 7, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board